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DOES PHILOSOPHY DESERVE A PLACE AT THE SUPREME COURT?

Thom Brooks

After the Supreme Court's decisions in *Vacco v. Quill*¹ and *Washington v. Glucksberg*² defending the right of states to ban assisted suicide, the Court made no mention in its decision of an amicus brief³ ("Philosophers' Brief") written in favour of assisted suicide by six well-established philosophers consisting of Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson.⁴ Some philosophers viewed this as a lamentable event, not least the authors of the "Philosophers' Brief."⁵

On the other hand, certain legal analysts celebrated this occasion, including Neomi Rao.⁶ Rao argues that law is a distinct practice from philosophy, as legal decisions are constrained by dictates of history, precedent, and institutional checks.⁷ In Rao's view, philosophy lacks such constraints, tending to embrace conceptual and theoretical abstractions. The legitimacy of philosophical insights is grounded independently of practices. On the contrary, judicial constraints serve also as a source of legal legitimacy. Thus, the use of philosophers by the Court, especially in politically contested cases, "provides a backdoor method for judicial policy making."⁸ If Rao's analysis is correct, one ought to dissuade one from referencing philosophers in the courtroom, for doing otherwise might lead to unjustified judicial decisions. Thus, the legal profession ought to hold philosophers and their theories at arm's length and outside the courtroom.

¹ 521 U.S. 793, 796-97 (1997) (holding that state bans against assisted suicide do not violate the Equal Protection Clause of the Fourteenth Amendment.)

² 521 U.S. 702, 706 (1997) (holding that state bans against assisted suicide do not violate the Due Process Clause or the Fourteenth Amendment).

³ Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110).

⁴ The majority decision does cite a brief written exclusively by bioethics professors. *Glucksberg*, 521 U.S. at 733 n.23.

⁵ See Ronald Dworkin, *Assisted Suicide: The Philosophers' Brief*, N.Y. Rev. of Books 41 (Mar. 27, 1997).

⁶ Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371 (1998).

⁷ See *id.* at 1371, 1380, 1397.

⁸ *Id.* at 1397.

This Comment endorses the view that philosophical analysis need not be incommensurable with sound judicial decision making. In fact, philosophy may act as an ally in the pursuit of sensible legal reasoning, rather than an impediment. As a result, Rao's position ought to be rejected. Her judicial thought did not develop in isolation; it was clearly influenced by the work of Charles Collier,⁹ Richard Fallon,¹⁰ Owen Fiss,¹¹ Charles Fried,¹² and Judge Richard Posner.¹³ Nevertheless, Rao's argument has begun to influence the legal profession.¹⁴

Part I criticises Rao's content analysis and subsequent assessment of fifty cases where the Court cited philosophers. First, the collection of cases studied is questioned, primarily because Rao overlooked some of the most important philosophers, such as St. Augustine, Karl Marx, and Socrates. If one accepts her criteria of when a philosopher is cited as a philosopher versus some other capacity (such as an economist or historian), then her data does not support her hypotheses. This Comment argues that references to philosophers have remained stable after a large increase in the 1970s, particularly when one takes account of post-1997 Court decisions. Second, Rao is criticised for praising the Court's references to philosophers in some instances and not others, especially with regard to the Court's early development.

Part II examines what Rao considers the best example of judicial policy-making via the backdoor: the legalization of abortion in *Roe v. Wade*.¹⁵ Rao claims that references to Plato had an adverse effect upon the Court's decision in *Roe v. Wade*. On the contrary, Plato's discernable influence was negligible, as he was mentioned briefly in a broad historical overview of Western civilization's response to abortion - a methodology Rao supports. This Comment searches unsuccessfully for an instance where philosophers were cited just once in controversial cases regarding racial integration, capital punishment's abolition and reinstatement, and the 2000 Presidential election. Philosophers are peculiarly absent from major controversial cases.

Part III challenges Rao's analysis of the importance of philosophy in the *Vacco v. Quill* and *Washington v. Glucksberg* cases. Rao claims the Court's majority decisions avoided the "Philosophers' Brief" mainly because the philosophers based their argument in theory, rather than a substantive legal analysis surrounding issues of judicial precedent.¹⁶ On the contrary, this Comment demonstrates that the majority and concurring opinions mention "philosophy" more often than the "Philosophers' Brief." This comment will show that the "Brief" is wedded to precedent and avoids

⁹ See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L. J. 191 (1991).

¹⁰ See Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 87 (1994).

¹¹ See Owen M. Fiss, *The Death of Law?* 72 CORNELL L. REV. 1 (1986).

¹² See Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

¹³ See Richard Posner, *The Problems of Jurisprudence* (Harvard 1964) and Richard Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L. J. 377 (1997).

¹⁴ Since its publication in 1998, Rao's article has been widely discussed amongst legal philosophers. See, e.g., Ronald J. Allen, *Common Sense, Rationality, and the Legal Process*, 22 CARDOZO L. REV. 1417 (2001); Ronald J. Allen, *Two Aspects of Law and Theory*, 37 SAN DIEGO L. REV. 743 (2000); M. Neil Browne, Kathleen Maloy, Jessica Pici, *The Struggle for the Self in Environmental Law: The Conversation Between Economists and Environmentalists*, 18 UCLA J. ENVT'L. L. & POL'Y 335 (2000/2001); James M. DuBois, *Physician-Assisted Suicide and Public Virtues: A Reply to the Liberty Thesis of "The Philosophers' Brief"*, 15 ISSUES L. & MED. 159 (1999); George P. Smith, *Judicial Decisionmaking in the Age of Biotechnology*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 93 (1999); and Bonnie Steinbock, *Opening Remarks*, 62 ALB. L. REV. 805 (1999).

¹⁵ 410 U.S. 113 (1973).

¹⁶ Rao, *supra* note 4, at 1371-72.

grand theorizing. Moreover, an implicit dialogue between the Court and the philosophers is proposed.

Finally, in Part IV, this Comment challenges Rao's use of "philosophy" as something entirely abstract and steeped in metaphysics. Philosophy is presented as a large umbrella covering diverse sub-fields, two of which are philosophy of law and political philosophy. These sub-fields are of great use to law. Thus, the Court has not used philosophers illegitimately to support personal policy preferences. Nor is the use of philosophy incommensurable with judicial decision-making.

I. THE USE OF PHILOSOPHERS IN COURT DECISIONS

One might suspect that Supreme Court Justices often cite philosophers. An initial Westlaw search on the Supreme Court database found the Court had at least mentioned the term 'philosophy' somewhere in more than 550 cases. Yet, in a similar Westlaw search for particular philosophers, from Plato to Dworkin,¹⁷ Rao found only forty-seven cases where the Court cited them.¹⁸ Most

¹⁷ Rao chose the following philosophers: Aristotle, St. Thomas Aquinas, Jeremy Bentham, Edmund Burke, Jacques Derrida, René Descartes, Ronald Dworkin, Michel Foucault, Hans-Georg Gadamer, G. W. F. Hegel, Martin Heidegger, Thomas Hobbes, David Hume, Immanuel Kant, Gottfried Leibniz, John Locke, Niccolò Machiavelli, J. S. Mill, Montesquieu, Thomas Nagel, Friedrich Nietzsche, Robert Nozick, Plato, John Rawls, Jean-Jacques Rousseau, Jean-Paul Sartre, Thomas Scanlon, Arthur Schopenhauer, Adam Smith, Baruch Spinoza, Judith Jarvis Thomson, Alexis de Tocqueville, and Ludwig Wittgenstein. *Id.* at 1373-74 n.5.

¹⁸ *Id.* at 1372-73. The forty-seven cases Rao found (with the philosopher referenced in parentheses) are: *United States v. Virginia*, 518 U.S. 515, 556 n. 20 (1996) (Plato); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836-37 (Plato, Spinoza, Descartes, and Sartre); *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (Nagel); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 n. 14 (1994) (Aristotle); *Arave v. Creech*, 507 U.S. 463, 479 n.1 (1993) (Blackmun, J., dissenting) (Bentham); *Morgan v. Illinois*, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting) (Kant); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587 n.1 (1991) (White, J., dissenting) (Aristotle); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 539 n.1 (1989) (Blackmun, J., dissenting) (Dworkin); *Bowen v. Gilliard*, 483 U.S. 587, 632-33 (1987) (Berman, J., dissenting) (Plato and Aristotle); *Edwards v. Aguillard*, 482 U.S. 578, 630 (1987) (Scalia, J., dissenting) (Aristotle); *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (Aquinas); *Delware v. Van Arsdall*, 475 U.S. 673, 697 n.9 (1986) (Stevens, J., dissenting) (Dworkin); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 665 n.41 (1985) (Stevens, J., dissenting) (Kant); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572, 582 (1985) (Powell, J., dissenting; O'Connor, J., dissenting) (Nagel); *Hewitt v. Helms*, 459 U.S. 460, 484-85 (1983) (Stevens, J., dissenting) (Dworkin and Mill); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 n.7 (1980) (Bentham); *Gannett Co. v. DePasquale*, 443 U.S. 368, 419-20, 422, 448 (1979) (Blackmun, J., concurring in part and dissenting in part) (Bentham); *Bell v. Wolfish*, 441 U.S. 520, 581 n.10 (1979) (Stevens, J., dissenting) (Kant); *United States v. Ceccolini*, 435 U.S. 268, 281 n.2, 284 (1978) (Burger, J., concurring) (Sartre and Wittgenstein); *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (Bentham); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 111 (1973) (Brennan, J. dissenting) (Plato); *Roe v. Wade*, 410 U.S. 113, 131 (1973) (Aquinas, Aristotle, and Plato); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.26 (1972) (Bentham); *Barker v. Wingo*, 407 U.S. 514, 520 n.10 (1972) (Bentham); *Lindsay v. Normet*, 405 U.S. 56, 68 n.14 (1972) (Kant); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 685 n. 9 (1966) (Harlan, J. dissenting) (Aristotle and Tocqueville); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 685 n. 9 (1966) (Harlan, J. dissenting) (Aristotle and Tocqueville); *Poe v. Ullman*, 367 U.S. 497, 514-15 (1961) (Douglas, J., dissenting) (Kant and Mill); *In re Oliver*, 333 U.S. 257, 271 (1948) (Bentham); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 673 (1944) (Black, J. concurring) (Adam Smith); *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring in part and dissenting in part) (Plato); *United States v. Miller*, 307 U.S. 174, 179 (1939) (Adam Smith); *Myers v. United States*, 272 U.S. 52, 116, 230, 234 (1926) (majority opinion; McReynolds, J., dissenting) (Montesquieu); *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133, 134 (1915) (Kant); *German Alliance Ins. Co. v. Gray*, 233 U.S. 389, 416 (1914) (Adam Smith); *Kavananaka v. Polyblank*, 205 U.S. 349, 353 (1907) (Hobbes); *Beley v. Naphtaly*, 169 U.S. 353, 360 (1898) (Aristotle); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 556, 559 (1895) (Burke and Adam Smith); *Farrington v. Tennessee*, 95 U.S. 679, 682 (1877) (Montesquieu); *Trist v. Child*, 88 U.S. 441, 450 n.22 (1874) (Montesquieu); *Slaughter-House Cases*, 83 U.S. 36, 110 n.39 (1872) (Field, J., dissenting) (Adam Smith); *Ex parte Garland*, 71 U.S. 333, 388 (1866) (Miller, J., dissenting) (Montesquieu); *Christ Church Hosp. v. City of Philadelphia*, 65 U.S. 300, 302 (1860) (Bentham); *Dodge v. Woolsey*, 59 U.S. 331,

references to philosophers were found to be quite brief, usually consisting of one or two sentences.¹⁹ A more recent representative example is *Nixon v. Shrink Missouri Govt. PAC* which stated, “Edmund Burke captured the tension in his Speeches at Bristol. ‘Your representative owes you, not his industry only, but his judgement; and he betrays instead of serving you, if he sacrifices it to your opinion.’”²⁰ Thus, at first blush, the *explicit* influence of philosophers on the Court appears to be quite weak.²¹

While Rao searches for members of a fairly comprehensive list of philosophers in Court decisions, there are some notable persons missing, such as St. Augustine, Gottlieb Frege, Edmund Husserl, William James, Søren Kierkegaard, Karl Marx, Bertrand Russell and, most importantly of all, Socrates.²² This made her selection process appear a bit strange as she searched for Aquinas and not Augustine, for Hegel and not Marx, for Wittgenstein and not Russell, and for Plato and not Socrates. However, after searching for these philosophers on the Westlaw database, the results were in keeping with Rao’s claim that extending one’s search to include other philosophers would have little effect.²³ While Rao completely overlooked citations of Socrates and Augustine, the broad consequences did not contradict her preliminary findings.

371 (1855) (Bentham); *United States v. Wood*, 39 U.S. 430, 438 (1840) (Montesquieu); *Bank of Augusta v. Earle*, 38 U.S. 519, 538, 571 (1839) (Montesquieu and Tocqueville); *Green v. Biddle*, 21 U.S. 1, 36 (1821) (Montesquieu); *Fletcher v. Peck*, 10 U.S. 87, 121 (1810) (Montesquieu and Adam Smith); (Rao, *supra* note 4, at 1373-74 n.6.) She omitted cases where a philosopher was referenced by an advocate, not by the Court. *Id.* at 1374 n.7.

¹⁹ *Id.*

²⁰ 528 U.S. 377, 409 (Kennedy, J., dissenting) (quoting Edmund Burke, *Speeches of the Right Hon. Edmund Burke* 130 (J. Burke ed. 1867).

²¹ I use the word ‘explicit’ to suggest the quite plausible influence of philosophical works on the reasoning processes of Court judges that exerts only an implicit presence. Rao agrees. See Rao, *supra* note 4, at 1375.

²² I have selected these names from *The Philosophers: Introducing Great Western Thinkers* (Ted Honderich e., Oxford 1999). It is worth noting that of the twenty-eight philosophers contemporary philosophers view as most important, Rao fails to note twelve of them. As Rao notes, there are a great many references to Grotius and Vattel, especially in early Court decisions. Rao, *supra* note 4, at 1373 n. 5.

²³ See Rao, *supra* at note 4, at 1373 n.5. My search yielded several new cases. Some of these are: *Tyler v. Cain*, 533 U.S. 656, 121 (2001) (Breyer, J., dissenting) (Socrates); *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (Burke); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580-81 (2001) (Thomas, J., concurring) (Socrates); *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) (Burke); *Crosby v. Nat’l Foreign Trading Council*, 530 U.S. 363, 391 (2000) (Scalia, J., concurring) (Augustine); *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting) (Socrates); *City of Chicago v. Morales*, 527 U.S. 41, 75 (1999) (Tocqueville); *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Montesquieu); *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819 (1995) (Marx, Russell)**; *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (Russell); *United States v. Maine*, 475 U.S. 89, 96 (1986) (Grotius); *Payton v. New York*, 445 U.S. 573, 596 (1980) (Grotius); *De Funis v. Odegaard*, 416 U.S. 312, 335 (1974) (Marx); *Roe v. Wade*, 410 U.S. 113, 717 (1973) (Augustine)**; *Leindienst v. Mandel*, 408 U.S. 753, 784 (1972) (Marshall, J., dissenting) (Marx); *Younger v. Harris*, 401 U.S. 37, 40, 42 (1971) (Marx); *United States v. Weldon*, 377 U.S. 95, 122 (1964) (Douglas, J., dissenting) (Socrates); *McGowan v. Maryland*, 366 U.S. 420, 566 (1961) (Douglas, J., dissenting); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 78-79 (1961) (Hobbes and Socrates)*; *Flemming v. Nestor*, 363 U.S. 603, 634 (1960) (Douglas, J., dissenting); *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (Socrates); *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (Grotius); Note *: This case ought to have been included in Rao’s content analysis but was not. Note **: This case was already included, lacking the additional philosophers from my search.

I omitted cases where philosophers were not referenced on behalf of their philosophical ideas, in keeping with Rao’s methodology. For example, I did not include *Good News Club v. Milford Central School*, 533 U.S. 98, 143-44 (2001) (Souter, J., dissenting) (citing a passage from *Rosenberger v. Rector & Visitors* listing the names of philosophers to make a non-philosophical point) nor *Bd. of Regents v. Southwall*, 529 U.S. 217, 243 (2000) (the university need not ‘teach Nietzsche’ nor ‘St. Thomas [Aquinas]’ without further mention of either person).

Quite problematically, Rao excluded cases where “a ‘philosopher’ is cited for a predominantly historical, economic, or legal principle.”²⁴ On the one hand, she is quite right to say that in certain instances, such as in Hume’s history of Britain, the philosopher concerned is not indulging in a philosophical enterprise. Thus, substantive references to certain works by philosophers may not be for any philosophical content. These references were correctly omitted from this study.

On the other hand, some works on history by philosophers such as Hegel or Marx are thoroughly philosophical treatments.²⁵ Unfortunately, Rao denies a relationship between economics and law as a matter of fact prior to investigating the potential influence of philosophy on law. Philosophers have much to contribute to substantive discussions of economics and law, yet Rao does not consider these contributions as “philosophical.” Most notably, references to the Scottish enlightenment philosopher Adam Smith were often omitted when discussing his “distinctively economic theories,” no doubt from his *The Wealth of Nations*, a work often the centre of philosophy dissertations.²⁶ Instead, Rao envisions philosophy as a radically narrow and false discipline, a practice occupied solely by questions of epistemology and metaphysics. This Comment will discuss her definition of philosophy at length in Part III. Suffice to say there are several reasons to reject her narrow definition of philosophical practice.

A. The Court’s Use of Philosophers

Rao’s original content analysis led her to argue: “[c]itations to philosophers occur primarily outside of majority opinions, suggesting that the citations lack--or replace--precedential authority.”²⁷ She found that nearly half of all opinions referencing philosophers were non-majority decisions.²⁸ In addition, more than half of all opinions referencing philosophers have been made over the last twenty years.²⁹ However, when one includes references to philosophers such as Russell and Socrates to the study, one arrives at very different results.

Table 1: Supreme Court Opinions Citing Philosophers

Years	Total	Majority	Concurring	Concurring and Dissenting, in part	Dissenting
1789- 1825	2	2	0	0	0
1826- 1850	2	2	0	0	0

²⁴ Rao, *supra* note 4, at 1374.

²⁵ See, e.g., G. W. F. Hegel, *The Philosophy of History* (Sibree trans., Dover 1956).

²⁶ See Rao, *supra* note 4, at 1374 n. 7.

²⁷ *Id.* at 1375.

²⁸ *Id.*

²⁹ *Id.*

1851-1875	5	3	0	0	2
1876-1900	3	3	0	0	0
1901-1925	3	3	0	0	0
1926-1950	6	3	1	1	1
1951-1975	16	8	1	0	7
1976-2000	28	9	3	1	15
2001	3	1	1	0	1
Total	68	34	6	2	26

One finds that since 1789, the Court has consistently, although with rarity, cited philosophers *only* in majority decisions until the latter half of the twentieth century. There has been a slow rise in majority decisions, coupled with a dramatic and recent rise in dissenting opinions. Perhaps, this is some cause for alarm. However, the use of philosophers in majority decisions and concurring opinions (41) is about a third greater than in dissenting opinions (28), including opinions concurring in part and dissenting in part.

Significantly, when one examines cases from 1970-79, 1980-89, 1990-99, and 2000-2001 one finds that the Court had a dramatic rise in references in the 1970s. After reaching this peak, the Court had stabilized and had actually begun to cite philosophers with slightly less frequency.

Table 2: Supreme Court Opinions Citing Philosophers, by decade

Years	Total	Majority	Concurring	Concurring and Dissenting, in part	Dissenting
1970 -1979	12	7	1	1	3
1980 -1989	12	3	0	0	9
1990 -1999	9	5	1	0	3
2000 - 2001	6	1	2	0	3
Total	39	16	4	1	18

If there is cause for alarm, it is due to Court cases decided in 2000 and 2001, after Rao's study. In merely two years, there are about half as many references to philosophers as there were in each of

the last three decades. Should this trend continue one might find up to thirty cases so affected, a substantial increase. Cases were evenly decided between majority decisions and concurring opinions (3) and dissenting opinions (3).

On the whole, the explicit references to philosophers appear relatively weak. This ought not to imply a correspondingly weak *implicit* influence of philosophers on the Court. Rao admittedly suggests that if one includes instances where the Court relied implicitly on philosophers and their philosophical ideas, the extent of this influence “may be greater [not less] than the data suggests.”³⁰

B Philosophy and Judicial Activism

The increased use of citations to philosophers is interpreted as a possible effect of judicial activism.³¹ The drafting of Court opinions is likened effectively to a zero-sum game: a philosophical reference somehow counteracts or replaces precedential authority.³² One might expect Rao to provide concrete examples where precedential authority carried insufficient weight. The problem is not that all philosophical references are ill advised. She wrote:

In the nineteenth century, Supreme Court decisions quoted philosophers at greater length than more contemporary opinions, but virtually all references were to Montesquieu, whose *L'Esprit des Loix* was repeatedly cited for propositions of limited government, balance of powers, and the need for virtuous citizens. As the nineteenth century was a time when the fundamental principles of American government were still being affirmed and fully articulated, the Court's reference to such thinkers seems natural and appropriate, especially because many references were to the principles of separation of powers and the institutional limits of the Court³³.

Against this view of judicial decision-making in the nineteenth century, Rao argues that the Court has moved away from political philosophers such as Montesquieu or Adam Smith and embraced theologians, existentialists, and linguists, such as Aquinas, Sartre, and Wittgenstein.³⁴ She condemns this transition. This characterization of philosophers such as Aquinas as theologian is certainly true.

³⁰ *Id.* at 1375.

³¹ *Id.* at 1376.

³² *Id.* at 1375.

³³ Rao, *supra* note 4, at 1376 n.14 (citing as examples *Myers v. United States*, 272 U.S. 52, 116, 230, 234 (McReynolds, J., dissenting) and *Ex parte Garland*, 71 U.S. 333, 388 (1866) (Miller, J., dissenting)).

³⁴ *Id.*, at 1377; *Id.*, at 1377 n.15, Rao cites *Roe v. Wade*, 410 U.S. 113, 134 (1975) (explaining the common law notion of “quickenings” might have its source in “Aquinas’ definition of movement as one of two first principles of life”); *Id.*, at 1377 n.16, Rao cites *Ceccolini*, 435 U.S. 281 (Burger, J., concurring) (noting that the decision of the Court did not require a “judicial excursion into an area about which ‘philosophers have been able to argue endlessly’, namely, the degree of ‘free will’ exercised by a person when engaging in an act such as speaking”), quoting Jean Paul Sartre, *Being and Nothingness* 433 (Philosophical Library 1956) (Barnes trans.); *Id.*, at 1377 n.17, Rao cites *Ceccolini*, 435 U.S. at 284 (Burger concurring) (“As one philosopher has aptly stated the matter, ‘[t]he freedom of the will consists in the impossibility of knowing actions that still lie in the future.’”), quoting Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* ¶ 5.1362 (Cornell 1971) (Pears & McGuinness trans.).

However, it would be a grave mistake to deny the enormous influence Aquinas³⁵ and theologians have had on modern Western law.³⁶

Rao's conclusion is:

Instead of deciding these cases in a way that would leave controversial decisions to the states and the political process, the Court has often developed fundamental rights and given an expansive reading of the Due Process Clause of the Fourteenth Amendment. To avoid criticisms of judicial activism, the Supreme Court, both in majority and dissenting opinions, may rely on philosophers.³⁷

Thus, the problem with the Court using philosophers is that, in so doing, the Court gives weight to non-legal sources rather than precedent. At best, Rao is selective about when philosophical references are desirable or problematic. For instance, recall her endorsement of the Court's use of philosophers in the nineteenth century. She claimed that this practice was acceptable because the "fundamental principles of American government were still being affirmed and fully articulated" at that time.³⁸ In Rao's view, ought not the basic structure of judicial authority be built around the U.S. Constitution and commensurable laws? On the contrary, the Court's numerous references were categorized as "natural and appropriate" when philosophers were discussing "principles of separation of powers and the institutional limits of the Court."³⁹ One is led into a strange paradox where, on the one hand, philosophy is praised when it defines the proper scope of judicial authority as well as articulates its mission *and*, on the other hand, philosophy is renounced for being a non-legal authoritative source. Philosophy cannot fulfil both roles simultaneously.

II. PLATO AND *ROE V. WADE*

Rao wrote:

An examination of particular cases reveals how the justices have used philosophers in controversial settings to express their own policy preferences or to reach conclusions not required by more conventional legal reasoning that utilizes analogy, judicial precedent, and the text of the Constitution.⁴⁰

³⁵ The best argument on Aquinas' contributions to legal and political thought is John Finnis, Aquinas: Moral, Political, and Legal Theory (Oxford 1998) in Oxford University Press's series entitled aptly "Founders of Modern Political and Social Thought."

³⁶ In his excellent historical study of Western jurisprudence, Harold Berman argues: "One of the purposes of this study is to show that in the West, modern times—not only modern legal institutions and modern legal values but also the modern state, the modern church, modern philosophy, the modern university, modern literature, and much else that is modern—have their origin in the period 1050-1150 and not before." Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 4 (Harvard 1998).

³⁷ Rao, *supra* note 4, at 1377.

³⁸ *Id.* at 1376.

³⁹ *Id.*

⁴⁰ *Id.* at 1377.

In general, she found that well-known philosophical figures have been cited to “support contested political positions” in recent cases involving sexual ethics.⁴¹ For instance, in *Poe v. Ullman*,⁴² Justice Douglas “made extensive use of philosophers” to argue for a constitutional right of doctors to discuss birth control options with married couples.⁴³ This is an overstatement, however. In fact, the so-called “extensive use” was limited to only Kant and Mill, discussed on merely two pages.⁴⁴

For Rao, the majority opinion in *Roe v. Wade*⁴⁵ is among the best examples of the Court citing philosophers to support personal policy preferences, rather than respecting judicial precedent or Constitutional authority.⁴⁶ Claiming that the Hippocratic Oath, that modern doctors continue to affirm, does not permit the application of abortive remedies,⁴⁷ Rao found the Court’s discussion of ancient Greek approval of abortion rather significant. In its majority decision in *Roe*, the Court argued that “[m]ost Greek thinkers . . . commended abortion, at least prior to viability.”⁴⁸ The Court cited Socrates in Plato’s *Republic*:

I think that when women and men have passed the age of having children, we’ll leave them free to have sex with whomever they wish . . . Having received these instructions, they should be very careful not to let a single foetus see the light of day, but if one is conceived and forces its way to the light, they must deal with it in the knowledge that no nurture is available for it.⁴⁹

If a foetus ought not to see the light of day, is that not a justification of its termination prior to viability? On the contrary, Rao claims “Plato does not commend abortion prior to viability.”⁵⁰ This claim can be divided into two parts: (1) Plato does not commend abortion and (2) Plato commends abortion after viability. As it turns out, Rao appears to agree with the first, but not the second, part of this claim.⁵¹

Shortly before the above citation from the *Republic*, Socrates said:

I think they’ll [the Guardians of the Republic] take the children of good parents to the nurses in charge of the rearing pen situated in a separate part of the city, but the children of inferior

⁴¹ *Id.* at 1379.

⁴² 367 U.S. 497, 514-515 (1961) (Douglas, J., dissenting).

⁴³ Rao, *supra* note 4, at 1379.

⁴⁴ *See id.* At 1379 n.26 (citing 367 U.S. at 514-15 (Douglas, J., dissenting)).

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ Rao, *supra* note 4, at 1379-80. Rao expresses similar concern over *Fletcher v. Peck*, 10 U.S. at 121 (distinguishing between Anglo-American and indigenous American conceptions of land) and *Harper v. Va. State Bd.*, 383 U.S. at 668 (Virginia’s poll tax was found to violate the Fourteenth Amendment’s Equal Protection Clause). Rao, *supra* note 4, at 1378.

⁴⁷ *Id.* at 1379. The Hippocratic Oath says that a doctor “will not give to a woman an abortive remedy.” (quoting L. Edelstein, *The Hippocratic Oath* 6 (Ares 1979)). In *Roe v. Wade*, Edelstein is cited at page three for the same statement. *See Roe v. Wade*, 410 U.S. 113, 131 n.15. Notably, the World Medicine Association’s approved translation does not contain this language. Instead, it states a doctor “will maintain the utmost respect for human life.” (World Medicine Association 1948.) This wording does not explicitly condemn abortion *à la* Rao’s assertion.

⁴⁸ Rao, *supra* note 4, at 1379 n.29 (quoting *Roe*, 410 U.S. at 131). The Court noted that Pythagoras was one exception. Rao, *supra*, at 1379, n.29 (citing *Roe*, 410 U.S. at 131).

⁴⁹ Plato, *Republic*, in COMPLETE WORKS 1088 (Cooper ed., Grube & Reeve trans., Hackett 1997).

⁵⁰ Rao, *supra* note 4, at 1379 n.29.

⁵¹ *Id.*

parents, or any child of the others that is born defective, they'll hide in a secret and unknown place, as is appropriate.⁵²

By "inferior parents" and "defective" parents, Plato referred to both parents who beget children out of wedlock or from marriages of people with incommensurable natures.⁵³ After each statement by Socrates, his interlocutor Glaucon voiced his sincere agreement.⁵⁴ Thus, Plato appeared to commend abortive practices *contra* Rao.⁵⁵ However, given standard ancient Greek practices, it is most likely that Plato would have recommended exposure as the most common birth control method.⁵⁶ This might count against his commending abortions prior to viability.

Nevertheless, Rao is troubled by the possibility of illegitimate influence on judicial decision-making. Against her view that "there were many persuasive legal arguments against recognizing a constitutional right to abortion," she believes "the Court uses esteemed philosophers to legitimise a controversial perspective."⁵⁷ The use of philosophers plays a crucial role in judicial legitimisation on contested issues. The question one must ask is whether or not the recourse to citing philosophers in controversial cases has played a *crucial* role in Court decisions. If this is the situation, then Rao's general account is accurate. Unfortunately for Rao, this is not the case.

In Justice Blackmun's majority decision in *Roe v. Wade*, there is no reason to believe that citing Plato was crucial to the decision's legitimacy.⁵⁸ Plato (and Aristotle)'s citation is the following: "Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25."⁵⁹ This brief mention was made within a discussion of the historical context of abortion.⁶⁰ Rather than used to justify a decision for or against a right to have an abortion, philosophers received no notice outside a purely historical context.⁶¹ What Justice Blackmun says regarding philosophy is relatively trivial:

One's philosophy, one's experiences, one's exposure to the raw edges of human experience, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one's thinking and conclusions about abortion . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.⁶²

⁵² Plato, *supra* note 50, at 1088..

⁵³ See *id.* at 1086-88.

⁵⁴ *Id.* at 1088, 1089.

⁵⁵ Elsewhere, Socrates says: "And then it is the midwives who have the power to bring on the pains [of birth], and also, if they think fit, to relieve them; they do it by the use of simple drugs, and by singing incantations. In difficult cases, too, they can bring about the birth; or, if they consider it advisable, they can promote a miscarriage." Plato, *Theatetus*, in COMPLETE WORKS 166 (Cooper ed., Burnyeat & Levett trans., Hackett 1997).

⁵⁶ In his footnote to his translation of the *Republic*, C.D.C. Reeve says: "There can be no doubt that Plato is recommending infanticide by exposure for these babies, a practice which was quite common in ancient Greece as a method of birth control." Plato, *Republic* 134 n.12 (Grube & Reeve trans., Hackett 1992).

⁵⁷ Rao, *supra* note 4, at 1380.

⁵⁸ For an excellent analysis of Justice Blackmun's decision-making in *Roe v. Wade*, see Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* 329-72 (Penguin 1998).

⁵⁹ *Roe v. Wade*, 410 U.S. at 131.

⁶⁰ Aquinas is cited in the discussion of the historical context of abortion. *Id.* at 134. Aristotle and Augustine are cited in a footnote. *Id.* at 133 n22.

⁶¹ See *id.* at 160 ("Aristotelian theory").

⁶² *Roe v. Wade*, 410 U.S. at 116.

The Court's justification of abortion's legality did not depend on Plato's writings or of any other philosopher.⁶³ Concurring opinions by Chief Justice Burger,⁶⁴ Justice Douglas,⁶⁵ and Justice Stewart⁶⁶ made no mention of philosophy or philosophers. Perhaps even more significant, neither did the dissenting opinions of Justice Rehnquist⁶⁷ or Justice White.⁶⁸

Regarding the majority decision, Justice White wrote:

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgement. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.⁶⁹

Justice White's dissent commensurates with Rao's disapproval of *Roe's* justification.⁷⁰ The major distinction is that the interpretation or use of philosophy or philosophers played no role in Justice White's, nor Justice Rehnquist's, rejection of the majority decision. In fact, "present medical knowledge" proved to be a major factor in Justice Blackmun's decision.⁷¹

This Comment has demonstrated that Rao erred in arguing that the *Roe* decision, or its separate opinions, were unduly influenced by explicit reference to philosophers. Is this true in other controversial cases as well? Other highly contested cases such as *Brown v. Bd. of Educ.*,⁷² *Furman v. Georgia*,⁷³ *Jurek v. Texas*,⁷⁴ and *Bush v. Gore*⁷⁵ neglected to make any citation to philosophers. There are no grounds to support the claim that the Court employs philosophical citations in order to reach particular decisions in controversial cases.

III. PHILOSOPHY AND THE RIGHT TO DIE

Rao claims that a comparison between Chief Rehnquist's opinion in *Glucksberg* and the "Philosopher's Brief" is a good case study to witness "the marked differences between philosophers and judges in both their goals and their methods of reasoning."⁷⁶ In Rao's estimation, Rehnquist

⁶³ *Id.* at 153-54.

⁶⁴ *Id.* at 207-08.

⁶⁵ *Id.* at 209-21.

⁶⁶ *Id.* at 167-71 (Stewart, J., dissenting).

⁶⁷ *Id.* at 171-78 (Rehnquist, J., dissenting).

⁶⁸ *Id.* at 221-23.

⁶⁹ *Id.* at 221-23 (White, J., dissenting).

⁷⁰ See Rao, *supra* note 4, at 1380.

⁷¹ *Roe v. Wade*, 410 U.S. at 163.

⁷² 349 U.S. 294 (1954). Rao argues that "[a]lthough *Brown* arguably went against the historical understanding of the Fourteenth Amendment, most commentators, including conservative ones, consider the case to be rightly decided because it responded to changes in social and political realities." Rao, *supra* note 4, at 1395 (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 n.16 (1995)). She clearly condones the usage of non-legal factors over precedent in this instance.

⁷³ 408 U.S. 238 (1972) (capital punishment declared illegal).

⁷⁴ 428 U.S. 262 (1976) (reversing *Furman v. Georgia*, thereby re-legalizing capital punishment).

⁷⁵ 531 U.S. 98 (2000) (reversing the Supreme Court of Florida's decision to recount votes in the state's Presidential election between George W. Bush and Al Gore, Jr.).

⁷⁶ Rao, *supra* note 4, at 1381.

“relies on history and a long social and legal tradition” prohibiting suicide.⁷⁷ In contrast, the philosophers in the “Philosopher’s Brief”:

advance only an abstract notion of liberty and do not offer a contrary historical narrative. Instead they put forward their own moral and political ideas, derived from a rational inquiry into the nature of an individual’s liberty interest, and supported by only the weakest judicial authority.⁷⁸

Rao’s argument lacks merit. An initial examination of the “Philosopher’s Brief” yielded citations to twenty cases, two statutory provisions, two law journals, and one book on jurisprudence. There are no citations to philosophers or to the philosophers’ own works. However, the philosophers repeatedly cited Chief Justice Rehnquist in *Cruzan v. Dir., Missouri Department of Health*.⁷⁹ For example, in *Cruzan*, the Chief Justice wrote, “[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality.”⁸⁰

Interestingly, in *Glucksberg*, Chief Justice Rehnquist appeared to reply: The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.⁸¹

Admitting “the court, in essence, authorized affirmative conduct that would hasten her [Nancy Cruzan’s] death,”⁸² Justice O’Connor argued:

Cruzan, however, was not the normal case. Given the irreversible nature of her illness and the progressive character of her suffering, Nancy Cruzan’s interest in refusing medical care was incidental to her more basic interest in controlling the manner and timing of her death . . . I insist that the source of Nancy Cruzan’s right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law.⁸³

What is this aspect of freedom? The “even more fundamental right to make this ‘deeply personal decision.’”⁸⁴ Were the philosophers entirely misguided? Rao admitted by stating: “Concededly, the philosophers do attempt more conventional legal arguments. For example, they discuss the Court’s expansion of privacy rights in *Casey* and *Cruzan v. Missouri Department of Health*, and also the states’

⁷⁷ *Id.* at 1384 (citing *Glucksberg*, 521 U.S. at 2268).

⁷⁸ Rao, *supra* note 4, at 1384.

⁷⁹ 497 U.S. 261 (1990).

⁸⁰ *Id.* at 281. Instead, Rao cites the Philosopher’s Brief in its brief reference to *Planned Parenthood v. Casey* 505 U.S. 833, 851-52 (1992). Rao, *supra* note 4, at 1383 (quoting 1996 WL 708956 at *5, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

⁸¹ *Glucksberg*, 521 U.S. at 725.

⁸² *Id.* at 743 (O’Connor, J., concurring).

⁸³ *Id.* at 742-43 (O’Connor, J., concurring).

⁸⁴ *Glucksberg*, 521 U.S. at 744 (O’Connor, J., concurring) (citing own opinion in *Cruzan*, 497 U.S. at 289).

interests in regulating suicide.”⁸⁵ In addition, the philosophers state their interests as a respect for principles of justice, liberty, and the American constitutional tradition.⁸⁶

To what extent did the “Philosopher’s Brief” influence Chief Justice Rehnquist in his majority decisions to *Vacco* and *Glucksberg*. Rao argued, “the Court made no mention of the brief in unanimously reaching the opposite conclusion.”⁸⁷ Indeed, there is no explicit reference to the “Philosopher’s Brief” in either case. It is difficult to determine whether or not Chief Justice Rehnquist was *indirectly* influenced, an option Rao does not entertain. For one thing, the “Philosopher’s Brief” correctly emphasized the importance of *Cruzan* to *Vacco* and *Glucksberg*. *Vacco* cites *Cruzan* four times⁸⁸ and *Glucksberg* cites *Cruzan* twenty-six times (plus another twenty-seven times in concurring opinions)⁸⁹.

Chief Justice Rehnquist’s majority decision in *Glucksberg* began by stating, “Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.”⁹⁰ Thus, the majority decision placed the same preliminary relevance and importance to the historical context of the subject matter in terms of culture, law, and, most notably, *philosophy* as Justice Blackmun did in his majority decision of *Roe v. Wade*. Significantly, although Chief Justice Rehnquist did not cite the “Philosopher’s Brief,” the *Brief for Bioethics Professors*⁹¹ was cited.⁹² In *Vacco*, Chief Justice Rehnquist referenced twice the Council on Ethical and Judicial Affairs of the American Medical Association.⁹³

Rao disapproved of the “respect for fundamental principles of liberty and justice” subscribed to in the “Philosopher’s Brief.”⁹⁴ Yet, this was essential to both Chief Justice Rehnquist’s decision and Justice O’Connor’s opinion. Citing *Snyder v. Massachusetts*,⁹⁵ Chief Justice Rehnquist wrote that fundamental rights and liberties are “so rooted in the traditions and conscience of our people as to be ranked as fundamental” such that, citing *Palko v. Connecticut*,⁹⁶ “neither liberty nor justice would exist if they were sacrificed.”⁹⁷ This was not the first time these words were chosen in a controversial case. In *Roe v. Wade*, Justice Rehnquist wrote in his dissent, “the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁹⁸

⁸⁵ See Rao, *supra* note 4, at 1383.

⁸⁶ *Id.*

⁸⁷ Rao, *supra* note 4, at 1371.

⁸⁸ See *Vacco*, 521 U.S. at 804, 807 (1997) (citing *Cruzan* three times).

⁸⁹ See *Glucksberg*, 521 U.S. at 708, 709, 710 (citing *Cruzan* twice), 711, 713 (citing *Cruzan* twice), 715, 720, 721, 721 n.17 (citing *Cruzan* twice), 722 (citing *Cruzan* twice), 723, 724 (citing *Cruzan* three times), 725 (citing *Cruzan* four times), 728, 730 (citing *Cruzan* twice), 732 (1997). See also *id.* at 763, 768, 768 n.10, 777 (citing *Cruzan* twice), 778 (Souter, J., concurring) and *id.* at 737, 742 (citing *Cruzan* four times), 743 (citing *Cruzan* three times), 744 (citing *Cruzan* twice), 743 n.11 (citing *Cruzan* twice), 744, 745 (citing *Cruzan* five times), 746 (citing *Cruzan* twice), 752 (O’Connor, J., concurring).

⁹⁰ *Glucksberg*, 521 U.S. at 711.

⁹¹ 1997 WL 348094.

⁹² *Glucksberg*, 521 U.S. at 733 n.23. See also *id.* at 754-55 (Souter, J., concurring) (citing Y. Kamisar, *Are Laws against Suicide Unconstitutional*, 32 HASTINGS CTR. REP. 36-37 (1993)).

⁹³ *Vacco*, 521 U.S. at 800 n.6, 801.

⁹⁴ Rao, *supra* note 4, at 1383.

⁹⁵ 291 U.S. 97, 105 (1934).

⁹⁶ 302 U.S. 319, 326 (1937).

⁹⁷ *Glucksberg*, 521 U.S. at 721.

⁹⁸ 410 U.S. at 174 (Rehnquist, J., dissenting). (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Justice O'Connor argued that Nancy Cruzan's right to refuse life saving medical treatment "was not just a common-law rule."⁹⁹ Instead, "this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law"¹⁰⁰ resting upon the "even more fundamental right"¹⁰¹ to make this "deeply personal decision."¹⁰² Clearly, Justice O'Connor grounds, in part, "an abstract notion of liberty ... derived from a rational inquiry into the nature of an individual's liberty . . ."¹⁰³ distinct from the common-law tradition.¹⁰⁴ Yet, these claims by Rao refer only to the "Philosopher's Brief."¹⁰⁵ In fact, the supposed absence of such talk in the *Glucksberg* case was supposed to be a prime example of how judicial decision-making is best performed by avoiding philosophers and abstract metaphysical concepts, such as liberty.

Were the philosophers in the "Philosopher's Brief" persuasive in the Court's decisions in *Glucksberg* or *Vacco*? This is difficult to determine. Certainly, the influence of the principal architect of the "Philosopher's Brief," Professor Ronald Dworkin, is quite strong amongst Briefs submitted to the Supreme Court, especially regarding these cases.¹⁰⁶ This Comment suggests both the majority decision and Justice O'Connor's concurring opinion may have been responding implicitly to the "Philosopher's Brief." Neither Chief Justice Rehnquist nor Justice O'Connor avoided discussion of bioethics, expounding on abstract notions of rights and liberties, nor the importance of taking stock of a philosophical and historical context.

IV. IS PHILOSOPHY OF ANY USE TO THE COURT?

Rao does not deny the possibility of philosophy's relevance to legal decision-making.¹⁰⁷ In her view, law is "semi-autonomous," endorsing a "softened version" of neotraditionalism.¹⁰⁸ She supports this view by quoting Richard Fallon:

Legal reasoning is distinctively reasoning *about* past political decisions and their current implications *within* a set of interpretive conventions that is in some ways peculiar to the law. Even when it borrows from other disciplines, law is a distinctive practice, with its own reality-making set of concepts, conventions and expectations.¹⁰⁹

Thus, according to Rao, "under this approach, nonlegal theory can *supplement* the law, but it does not *supplant* its particular form of reasoning."¹¹⁰ The law is a subject distinct from philosophy.¹¹¹

⁹⁹ *Glucksberg*, 521 U.S. at 743 (O'Connor, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 744.

¹⁰² *Id.*

¹⁰³ Rao, *supra* note 4, at 1384.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ Not including the Philosopher's Brief, Dworkin is cited in 1996 WL 656244 at *15-16, 1996 WL 656340 at *13 n.3, 1996 WL 709339 at *17 n.10, 1996 WL 711194 at *14 n.20, 1996 WL 711178 at *7, 1998 WL 96285 at *17, 1999 WL 766039 at *13 n.8, 2000 WL 235233 at *7-11, and 2001 WL 43395 at *34.

¹⁰⁷ *See* Rao, *supra* note 4, at 1384.

¹⁰⁸ *Id.* at 1385.

¹⁰⁹ *Id.* at 1386 (quoting Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J. L. & PUB. POL'Y 87, 88-89 (1994)).

¹¹⁰ Rao, *supra* note 4, at 1386.

¹¹¹ *See Id.* at 1385 (citing Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38-39 (1981) and Owen M. Fiss, *The Death of the Law?* 72 CORNELL L. REV. 1, 18 (1986)).

Court decisions have “real-world consequences,” in contrast to “academic or philosophical arguments.”¹¹² Institutional constraints and precedent that supposedly do not put limitations on philosophical deliberations bind the Court.¹¹³ Rao seeks to discredit the contributions of philosophers such as Dworkin and Rawls by highlighting the lack of regard for legal precedent in their work.¹¹⁴ For example, Rawls is criticised for his definition of “justice as fairness” from his book *Political Liberalism*.¹¹⁵ The criticism is unwarranted, as Rawls is concerned with developing his argument of justice from his *A Theory of Justice*.¹¹⁶ He is not pronouncing what any judge should do in a particular case. Nor is either work meant to do so.

Rao targets Dworkin in particular, who “delights in being a theorist”:¹¹⁷ “some philosophers, like Dworkin, will remain unmoved in their opinions and theories by the ordinary world of politics and practical matters.”¹¹⁸ Does Dworkin fail to appreciate the judiciaries “built-in conservatism”?¹¹⁹ He says:

Law is also different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone’s conception of justice is his theory, imposed by his own personal convictions, of what these rights actually are. Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past . . . Precedent also has a prominent place in our practices: past decisions of courts count as sources of legal rights.¹²⁰

At first glance, this statement could have been mistaken as having Rao as its author instead of Dworkin. Both agree that there is a major difference between philosophical treatments of justice and the practice of law, legal decision-making ought to be grounded in judicial precedent, etc. It would appear Rao might have misrepresented Dworkin’s position on legal reasoning.

Not all philosophers are misguided. For example, Martha Nussbaum is commended for saying:

Judges are never free to go for the best. They are constrained by history, by precedent, by the nature of legal and political institutions. This means that any philosophy that is going to be of help to the law must be flexible and empirically attentive, rather than prissy and remote.¹²¹

Interestingly, Nussbaum does not seem to be adding anything to Dworkin. Yet, for Rao, only Nussbaum understands judicial decision making adequately.

¹¹² Rao, *supra* note 4, at 1389.

¹¹³ *Id.*

¹¹⁴ See *id.* at 1397 (“All of the elegant and erudite essays in The New York Review of Books can be written and read without much real-world consequence.”).

¹¹⁵ John Rawls, *Political Liberalism* xvi-xx (Columbia 1996).

¹¹⁶ John Rawls, *A Theory of Justice* (Harvard 1972).

¹¹⁷ Rao, *supra* note 4, at 1390.

¹¹⁸ *Id.* at 1392. But cf. *id.* at 1393 n.98 (noting that “[w]hile against Dworkin’s philosophical efforts to influence the Court, Judge Posner frequently makes nonlegal references in his own opinions.”)

¹¹⁹ *Id.* at 1398, 1400.

¹²⁰ Ronald Dworkin, *Law’s Empire* 97, 99 (Hart 1986).

¹²¹ Rao, *supra* note 4, at 1391 (quoting Martha Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1643 (1993)).

Invoking Nussbaum, Rao wrote: “Perhaps most professional philosophy is prissy and remote, but down-to-earth philosophical insights can undoubtedly benefit legal understanding.”¹²² This begs the question of what she refers to by “down-to-earth philosophical insights.” She wrote, “‘Down-to-earth’ philosophical insights might include more political philosophy, or perhaps even economic theory. These ideas, often invoked by the Court in the nineteenth century, articulated principles for republic government and contained insights relevant to legal problems.”¹²³ Thus, “down-to-earth” philosophical insights are grounded in social practice, such as politics or economics, and not pure abstraction, as one might find in the fields of epistemology or metaphysics. Philosophy has a legitimate role to play after all.¹²⁴

In Rao’s view, philosophy is essentially a discipline composed of “metaphysics and epistemology.”¹²⁵ Furthermore, abstraction is often linked to philosophy.¹²⁶ She wrote: “What do metaphysics and epistemology have to do with concrete results? Not very much. While there may be particular philosophies that are consequentialist, such as utilitarianism, the philosophical enterprise is a deontological one that aims at principles, not at ends.”¹²⁷ This is demonstrably false, unsurprising given her sole citation of one sentence from Kant’s moral theory.¹²⁸ Epistemology and metaphysics are just two fields under the umbrella known as philosophy. Philosophy also incorporates philosophy of law, legal ethics, and logic, amongst many other subfields.¹²⁹ To reduce all of philosophy to metaphysics is a gross oversimplification that erases the complexity and diversity of the philosophical discipline.

Is it the case that “the Court references philosophers to generate political approval”¹³⁰? No philosophers have been mentioned in any politically contentious court decision regarding racial integration, capital punishment’s abolition and reinstatement, and the 2000 Presidential election. In instances where philosophers were cited, such as in *Roe v. Wade*, the effect on the ultimate decision was negligible. It is rather the case that the Court may reference nothing philosophical at all, responding only to “changes in social and political realities” when deciding politically contentious decisions. According to Rao, such actions were justifiable in validating *Brown v Board of Education*.¹³¹

V. CONCLUSION

This Comment has demonstrated that policy judgements are not masked by philosophical references, nor do philosophers play any crucial role in contentious judicial decisions. Rao’s study is flawed for many reasons: incomplete content analysis, poor assessment of data, and an inadequate

¹²² Rao, *supra* note 4, at 1392. See *id.* at 1400.

¹²³ *Id.* at 1392 n.94.

¹²⁴ It is a curiosity what Rao considers to be political philosophy: after all, the philosophers she criticises for not doing political philosophy are “political philosophers” on her own account. *Id.* at 1372 n.5.

¹²⁵ *Id.* at 1393.

¹²⁶ See *Id.* at 1372, 1383-84, 1389, 1390-94, 1398, 1401.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1393 n.101.

¹²⁹ *The Oxford Companion to Philosophy* 940 (Ted Honderich ed., Oxford 1995).

¹³⁰ Rao, *supra* note 4, at 1386.

¹³¹ *Id.* at 1395.

definition of philosophy. She should be criticised for hypocritically praising Court philosopher references in some instances and not others, especially with regard to the Court's early development. This Comment searched unsuccessfully for an instance where philosophers were cited just once in controversial cases regarding racial integration, capital punishment's abolition and re-legality, and the 2000 Presidential election. Philosophers are peculiarly absent from major controversial cases.

Rao claims the Court's majority decisions avoided the "Philosophers' Brief" because the philosophers' argument was grounded in theory, not substantive legal argument surrounding issues of judicial precedent. This Comment challenges Rao's use of "philosophy" as something entirely abstract and steeped in metaphysics. Philosophy is presented as a large umbrella covering diverse sub-fields, two of which are philosophy of law and political philosophy. These sub-fields are of great use to law. Thus, the Court has not illegitimately used philosophers to support personal policy preferences. Nor is the use of philosophy incommensurable with judicial decision-making.